IN THE MATTER OF ARBITRATION BETWEEN

RAINBOW FOODS	)	
"Employer"	)	
	)	FMCS Case No. 060921-59957-7
AND	)	Discharge
	)	(Pokorny)
UFCW, LOCAL NO. 789	)	
"Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: November 20, 2006; St. Paul, MN

APPEARANCES

FOR THE EMPLOYER: Howard Tarkow, Attorney
Maslon, Edelman, Borman & Brand, LLP
90 South 7th Street, #3300
Minneapolis, MN 55402
Steve Million, Regional Human Resources Manager

FOR THE UNION: Roger Jensen, Attorney
Jensen, Bell, Converse & Erickson
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St. Paul, MN 55101
Caroline Larsen, Business Agent
John Porkorny, Grievant
Katherine Priot, Witness
Holly LeTexier, Witness

ISSUE

Was the discharge of the Grievant for just cause?

If not, what remedy applies?

INTRODUCTION

This matter came on for hearing before neutral arbitrator John J. Flagler on November 20, 2006, at the offices of the Bureau of Mediation Services, State of Minnesota, St. Paul, MN. The case deals with a grievance challenging the discharge of bargaining unit employee John Pokorny (the "Grievant") on September 11, 2006 for selling cigarettes to a minor on September 10, 2006 during a police tobacco compliance check sting operation.

The parties stipulated that the matter was procedurally properly before the arbitrator for decision.

RELEVANT CONTRACT LANGUAGE

Article 10, page 32, of the Collective Bargaining Agreement, Joint Exhibit 1 reads:

DISCHARGE

A. No employee shall be discharged except for just cause.

B. The properly accredited officers or representatives of both parties of this Agreement shall be authorized to settle any dispute arising out of a discharge. Complaints regarding unjust discharge must be filed in writing with the Union within ten (10) calendar days of such discharge or layoff or the member nullifies any further claims regarding same.

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C. Warning Notices and Discharge. In all instances of discipline, except where the grounds are sufficient to constitute just cause for immediate discharge, the Employer will give the employee at least one (1) warning notice in writing, with a copy to the Union.

ARTICLE 23
MANAGEMENT RIGHTS

The Company's right to manage is retained and preserved except as abridged or modified by the restrictive language of this Agreement

FACTS

The Grievant is a 19-year old part-time customer service representative working at the Employer's West St. Paul retail grocery store. He has been employed by the Employer since late 2002. He has been a bagger, a cashier, a speed zone attendant and since February 2006, has been a customer service representative working the customer service counter. He is a part-time

student at Inver Hills Community College. In the four years that the Grievant has worked for Rainbow Foods he has not had any disciplinary actions against him.

Customer service manager Katherine Prior testified that because of the demographics of the area in which the West St. Paul store is located, rarely do underage persons attempt to purchase cigarettes. She stated that she couldn't recall a single incident of an underage person attempting to purchase cigarettes from her in the four years she has worked at the store.

The Employer presented evidence that the Grievant received training that included instruction regarding the prohibition against sales of tobacco to persons under 18 years of age on May 23, 2005.

On Sunday, September 10, 2006, at approximately 10:45 a.m., the Grievant was working as a customer service representative. Full-time customer service manager, Holly LeTexier, was also working the customer service desk at that time. The Grievant was subordinate to LeTexier.

Both the Grievant and Prior testified, as was corroborated by a surveillance video, a young woman approached the Grievant and asked for a package of cigarettes. He left the customer service desk and walked behind her to the locked cabinet where cigarettes are kept. He unlocked the cabinet and removed a pack of cigarettes, relocking the cabinet before returning to the customer service desk. When he got to the customer service desk he asked the customer for her ID. She gave the Grievant her ID and following instructions, he entered her date of birth into the cash register/computer. The screen of the computer flashed, "not for sale."

The Grievant testified that he did not know what that prompt meant so he cleared the cash register and went through the same procedure again, entering the customer's date of birth. He received the same "not for sale" prompt. He then asked LeTexier what the prompt meant. She looked at it and said she did not know. He then cleared the cash register again and put in the customer's birth date and it again showed the prompt "not for sale." LeTexier looked at the prompt along with the Grievant and then keyed "clear, enter" on the computer which allowed the transaction to go through.

The Grievant stated that he believed that the customer had been cleared to make the purchase and he then took her money for the purchase price, completing the sale. He did not examine the driver's license closer which would have disclosed that the customer would turn 18 on 5/25/07. He also did not attempt to calculate the customer's age from her date of birth.

The customer left and shortly thereafter an undercover female police officer approached the Grievant, identified herself, and issued him a citation for illegal sale of cigarettes to a minor.

The next day the Grievant was terminated for the sale. No action was taken against LeTexier because of her involvement.

The Grievant is being represented by a public defender in the misdemeanor charge against him in the Dakota County District Court. He has entered a not guilty plea and as of the date of this arbitration hearing was awaiting a jury trial.

POSITION OF THE COMPANY

The record establishes that Rainbow has met its burden of proof to establish that it had just cause to terminate Grievant's employment. Grievant admitted that he knew a person must be 18 years old to legally buy cigarettes. He also knew that it is against the law to sell tobacco to a minor and doing so violated Rainbow policy. Further, Grievant admitted that he knew that selling cigarettes to a minor was grounds for dismissal. Grievant learned this and other critical information in a training program that even a key union witness, Prior, complimented for its quality and importance.

Grievant also had notice that his job could be in jeopardy for a violation, because it was in the policy that he signed for on April 3, 2004. The policy leaves open the possibility of other, lesser forms of discipline. However, Million testified that the intent was only to take into account a mitigating circumstance where a customer had used a fake identification card. No such mitigation occurred in the present case.

Rainbow's policy is reasonably related to the orderly, efficient and safe operation of its business. Rainbow takes a firm position on the enforcement of its policy that prohibits tobacco sales to minors. The Company is entirely justified in doing so, and its policy is rooted in the legal implications for violations. Minnesota law makes it a misdemeanor to sell tobacco to persons under age 18. It is also illegal under the Dakota County Tobacco Ordinance to sell cigarettes and other tobacco products to minors. While Grievant is now answering to prosecutors and defending against the misdemeanor charge, Section 1100 of the county ordinance makes Rainbow as the licensee for tobacco sales responsible for Grievant's wrongdoing.

The Company's rules against illegal tobacco sales are also consistent with community standards. Section 100 of the Dakota County Tobacco Ordinance states, in part, that its regulations "further the official public policy of the State of Minnesota in regard to preventing young people from starting to smoke…"

Consistent with these regulations, legally mandated tobacco stings of retailers like Rainbow are one tool that authorities have to discover unlawful cigarette sales to minors. Rainbow's zero tolerance of failed tobacco compliance checks is a fair and reasonable rule rationally related to government regulation and public policy.

Rainbow exercised caution and followed the necessary steps to establish that Grievant unlawfully sold cigarettes to the minor. When the matter came to the store director's attention, he referred it to Million, whose duties and responsibilities as Regional Human Resources Manager include labor relations. He promptly arranged for the loss prevention department to investigate the matter and obtain the store security videotape showing the events at the service counter.

Million also contacted Prior, who is in the bargaining unit position of assistant store director, to inquire further. She confirmed that the Grievant had committed a violation.

All of this information established conclusively that Grievant wrongfully sold cigarettes to a minor. This was the finding in the loss prevention report, it was corroborated on the videotape and confirmed by Prior.

Rainbow conducted a full, fair and objective investigation. There is no contention that Rainbow denied the Grievant Union representation, or otherwise interfered with his right to tell his side of the story or defend himself.

In the investigation, Prior urged Million to consider Grievant's service record as a mitigating factor against termination of employment. Rainbow does not dispute that the Grievant has a record free of prior discipline. However, the gravity of his offense substantially outweighs any credit for being a good employee over three years. Rainbow established a legitimate condition of employment that no employee may sell cigarettes to minors in violation of state and local law and public policy. Rainbow's license to legally sell the products in question is dependent on employee compliance. Employees' adherence to these laws is a reasonable expectation of their performance.

Grievant's work record might have been a mitigating factor if Rainbow had put him in a position of being ignorant of his duties and responsibilities or naïve about the seriousness of selling tobacco illegally. That is not the case here. The Grievant passed a quality training program. He knew the legal prohibitions. He knew it was a serious matter. Even Prior, testifying on his behalf, admitted she was confident that he knew the rules when she scheduled him to work the service counter. In fact, Prior testified that she would not have permitted him to work the service counter if Rainbow had not trained him to sell tobacco legally.

The investigation conclusively established the violation. The investigation established that Grievant sold cigarettes to a 17 year old shopper after (1) snubbing conspicuous evidence on her driver's license that she was under 18 years of age; (2) disregarding the instructions he received in training to calculate her age; (3) overlooking the sign in the working area telling him that a person born after September 10, 1988 was too young to legally buy tobacco; and (4) ignoring his training to stop a sale when the register told him "not for sale."

Rainbow supported him with multiple tools to be sure he understood how to comply. There was no effort to trick or deceive him about the obligations attendant to this position, or set him up to fail. On the contrary, Rainbow affirmatively put him on notice in the policy that he signed that "Local law enforcement agencies are legally required to conduct compliance checks. The local police send minors into grocery stores to try and purchase the products illegally." In the same document, Rainbow warned him that a violation had legal consequences and could result in fines.

Rainbow has applied the rule and penalty even handedly and without discrimination to all employees. The termination of Grievant's employment for this violation is consistent with the actions that Rainbow has taken in all other instances where law enforcement authorities have

issued citations for unlawful product sales to minors. Million testified that, in the past two years, virtually all responsible employees in seven instances of illegal sales of tobacco or alcohol to minors lost their jobs. He testified to only one exception, involving the Woodbury store employee whose employment Rainbow did not terminate because of the mitigating circumstance of the shopper illegally using a fake identification card. Otherwise, Rainbow has been consistent in these situations and Million warned the Grievant in training – a violation will result in termination of employment.

Termination of the Grievant's employment did not violate the Collective Bargaining Agreement. Rainbow submits that its presentation to the Arbitrator conclusively established that it had just cause to terminate the Grievant's employment. His actions created an intolerable risk to the Company's reputation as a law-abiding retailer and have jeopardized its license to legally sell tobacco products to adults. The Union suggested at the hearing that the Grievant's wrongdoing should be excused by his lack of ulterior motive to "curry favor" with the young girl and being devoid of intent to do wrong. Rainbow does not believe that the Grievant's motives or intentions are material to the issue that the Arbitrator will decide. The law is broken when a retailer sells tobacco to a minor, even if the guilty employee is a satisfactory employee. The policy is violated when the same employee sells tobacco to a minor.

The Rainbow store in West St. Paul will lose its license to legally sell tobacco for a day if there is another violation, and Dakota County will not care just why it happened or about the work record of the employee. Whether the violation is accidental, mistaken, or a consequence of employee negligence, the license will be suspended and Rainbow will be fined. It could not be made clearer to employees who choose to work in the store behind the service counter that if they do not comply after being taught how, and their violations put the business at risk, they can no longer work for Rainbow.

The Union remarked in Counsel's opening statement that the Collective Bargaining Agreement dictates that the Grievant could not be terminated for this offense without a warning. Of course, the labor agreement contains no such provision. Article 23 extends to Rainbow a management right to manage its business except as modified by the contract. Nothing in the contract restricts Rainbow's right to terminate the Grievant's employment for his conduct. Article 10, on which the Union solely relies, expressly contemplates that there are offenses for which immediate dismissal does not violate the contract. Rainbow consistently enforced a policy of summarily dismissing employees for making unlawful sales of tobacco and alcohol to minors. The absence of Union challenge to the prior seven, comparable termination decisions demonstrates the progressive discipline is not required in these extraordinary cases that have criminal law and public policy ramifications.

The Union has also contended that Grievant should be reinstated because he relied on LeTexier's decision to clear the register and allow him to conclude the illegal cigarette sale. Rainbow submits that the Arbitrator should summarily dismiss this argument. It would be one thing if the conversation between the Grievant and LeTexier had gone something like this:

Grievant: Holly, I need help. This customer is trying to buy cigarettes. I checked her ID and entered her birth date into the register, but I keep getting this message "not for sale." What should I do?
Holly: Hmm, I don't know. I'll clear it and then you can make the sale.

If that had been the evidence, perhaps the Grievant could have justifiably relied on his supervisor to sell the cigarettes. That is not at all what happened. Grievant did not tell LeTexier he was selling cigarettes. He did not show her the driver's license. He did not tell her that the "not for sale" message kept coming up after he entered the birth date. LeTexier did not even know that the customer was trying to buy cigarettes. In short, the Union's contention that the Grievant's conduct was condoned by the supervisor ignores the testimony of its own witnesses – Grievant and LeTexier – that he did not tell her what was happening and it never occurred to her that she was condoning or approving a tobacco sale to a minor.

The Union's other excuses for Grievant's conduct and in support of this grievance deserve little attention. Union witnesses argued that the "not for sale" message causes confusion because the register flashes the same sign when a customer is trying to buy cauliflower. The Arbitrator should reject this trivialization of the issue. The minor was not buying cauliflower, and Grievant would not have needed to ask her to prove her age to buy vegetables. The Union also suggested that the store was so busy as to be a burden on the service counter employees. There were only three or four customers at the counter. A busy store, which should be a shared goal of the employees and Union, does not excuse blatant violations of the law and policy, and, in any event, the videotape that the Arbitrator viewed showed virtually no customer activity at the counter to distract the Grievant.

The Grievant appeared remorseful at the hearing, but the Arbitrator should disregard his self-serving promise to never again commit such a violation if he is reinstated. His vow is not evidence on the issue in this case, and discharge from employment was the correct consequence for his actions.

POSITION OF THE UINON

Failing alcohol and tobacco compliance checks is serious business for a retailer because of the potential for lost revenues which would occur if the tobacco sales licenses are suspended for compliance violations. Retailers commonly appear before city councils pleading that their licenses not be suspended. Invariably, they claim it was the clerk's fault which has been corrected because the clerk has been terminated.

In this case, there were extenuating and mitigating circumstances that mitigate against termination of the Grievant. The Employer's claim that the Grievant knew that the female customer was under age. The facts do not support that assertion.

The Grievant's testimony was corroborated by the testimony of the customer service manager, Holly LeTexier, and the surveillance video, that he made multiple attempts to verify whether the customer was old enough to purchase cigarettes. He asked the customer for her

driver's license as he was required to do. He entered her date of birth in the computer and received a prompt on the computer screen stating "not for sale." He did this two times and because he did not understand that prompt, he asked LeTexier what it meant. She looked on the computer screen and she testified that she also did not know what the prompt meant and that she stated that fact to the Grievant. He then entered the birth date a third time and when the same prompt "not for sale" came up on the screen, LeTexier keyed "clear, enter" which allowed the sale to go through. The Grievant testified that he mistakenly but honestly believed that the sale was approved and he did nothing further to determine the age of the customer.

Regional HR Manager, Steve Million, testified that he conducted a training session which included the Grievant in May 2005, almost a year and one half prior to the incident. He was himself underage at the time and could not sell tobacco products. He told those attending that if they entered the birth date of an underage individual for a tobacco sale the prompt would show "not for sale."

Neither the Grievant nor LeTexier had ever received that prompt before and had no idea on September 10, 2006 that the prompt meant that the customer was underage. In fact, Prior, the manager of customer services at the West St. Paul store, testified that in over four years working at that store, she never had an underage person attempt to buy cigarettes and she did not know what the "not for sale" prompt meant.

Caroline Larsen, the Union's business agent assigned to Rainbow Foods stores testified that she called customer service managers, assistant store managers and long term full-timers in the 11 Rainbow Foods stores in the Local 789 jurisdiction and that none of the persons she talked with knew what the "not for sale" prompt meant in a tobacco sales transaction.

To further confuse the matter, the Employer distributed "Policies and Procedures" relating to lottery/alcohol and tobacco sales to its employees, including the Grievant, on April 3, 2004. In that document employees are instructed to enter the date of birth for all tobacco sales and then the policy reads:

> The receipts will appear with "ID ENTERED" with the date. If the sale is restricted, the display will prompt an error message.

Those written policies and procedures do not state that if the sale is restricted the prompt will read "not for sale." It states there will be "an error message" which was not what appeared on the Grievant's computer on September 10, 2006.

In fact, the Grievant, LeTexier, Prior and Million all testified that the prompt "not for sale" comes up during routine cash register operations when the product cauliflower is entered.

The evidence clearly supports the Grievant's sworn testimony that he did not intentionally sell tobacco products to a minor and that he believed that the customer was of sufficient age to purchase tobacco products. The fact that he entered her birth date in the computer three times, and asked his customer service manager what the "not for sale" prompt

meant makes it clear that his sale of cigarettes to the minor was the result of his error which was caused by the unusual prompt on the computer screen.

In addition, the Employer has also committed a technical violation of the Collective Bargaining Agreement in the manner it terminated the Grievant. Article 10(C) of the collective Bargaining Agreement requires the Employer to give at least one prior written warning to an employee, before the employee can be terminated. There is an exception in that contract language for offenses "where the grounds are sufficient to constitute just cause for immediate discharge."

Although the Employer now argues that Million's told employees that they would be fired for a first offense of sale of tobacco to minors, the Employer's written procedures contradict his statement. Instead of saying that first offenses will be dealt with by termination, the Employer's polices, and procedures with regard to lottery/alcohol and tobacco sales, signed by the Grievant state that such sales "may result in discipline up to and including termination." That instruction clearly means that other forms of discipline may be imposed for such violations. In fact, business agent Caroline Larsen testified that in three prior cases, Rainbow Foods, either under its current ownership or under the ownership of Fleming Companies, suspended clerks who sold tobacco to minors, rather than terminate them. Larsen further acknowledged that there have been cases where clerks have been terminated for such sales and that the Union did not bring those cases to arbitration because it was clear that the offending clerks were selling to persons they knew were minors; a practice known as "sweethearting."

Because the Employer's policies make clear that forms of discipline other than termination might be imposed for selling tobacco products to a minor, the immediate discharge exception is not applicable and the Grievant must be given one written warning before he can be terminated for this offense.

The Grievant has an exemplary record of employment during the four years he has worked for Rainbow Foods. He has no prior disciplinary history. His manager, Katherine Prior, stated that he is bright, that he is a "very conscientious worker" and that she believes that he should be given another chance and should be reinstated.

The Grievant is a shy individual who is honest and is quite embarrassed by his mistake. He deserves a second chance because of his record in addition to all of the facts and circumstances of the case.

He also has received sufficient punishment outside of the employment context. He has been charged with a misdemeanor offense and if convicted, faces the potential of up to a $1,000 fine and 90 days in jail. He has pled not guilty and has been assigned a public defender who will be defending him in a jury trial sometime in the future. The Union submits that the criminal proceedings against the Grievant, standing alone, is sufficient punishment for the mistake he made in selling cigarettes to a minor.

The Union requests that the Arbitrator sustain the grievance and reinstate the Grievant to his former position with a full make whole remedy.

DISCUSSION AND OPINION

In order to reach a just and fair resolution of this matter it is necessary to first set the legal and social context in which the Employer formed the decision to terminate the Grievant's employment. In recognition of the solid medical evidence that tobacco smoking, and even second hand tobacco smoke ingestion constitutes a health menace of almost catastrophic proportion every sub-division of government has passed laws to curb the development of smoking addiction by prohibiting the sale of tobacco products to minors.

These legal restrictions and prohibitions as in the context of the present case, commonly carry heavy sanctions against retailers for sales of tobacco products to minors by their store clerks. The sanctions are usually unforgiving in that the retailers routinely suffer fines and risk loss of their license to sell tobacco products despite clearly written and effectively promulgated work rules to their sales clerks.

Rainbow Foods follows a common practice in the retail grocery business by pursuing a "zero tolerance" policy towards enforcing strict state and local prohibitions against selling tobacco to minors. That policy makes a first offense punishable up to and including termination of employment.

The Union has shown its support for Rainbow's strict work rule enforcement in this regard by never having filed a grievance before in any of the many terminations effected over the many years that the Employer's policy has been in place. The question naturally arises, therefore, as to what is different in the matter at hand?

In the first instance, consideration must be given to the connotations of the term "zero tolerance" – a coinage that has entered popular usage in recent years. Its meaning can be fairly derived from the appearance of the term of art in rules of conduct for gathering places including schools, the military, and the workplace.

The common message carried by the term zero tolerance seems to be strict enforcement with no exceptions to or deviations from the work rule in question and no mitigation of the penalty for violation thereof. The term seems to be routinely used to prohibit conduct which is also unlawful such as possession or use of illicit drugs, firearms, alcohol, or acts of sexual harassment or transgressions against the employment and civil rights of protected classes.

Obviously "zero tolerance" represents a positive statement of concern for strict compliance with applicable law and public policy. The concept of zero tolerance or strict compliance, however, must still conform with well established principles of just cause as these are embodied in collective bargaining agreements.

A fundamental principle of just cause requires that the penalty for a work rule infraction must fit and not exceed the severity of the offense. This established standard covers the weighing of mitigating factors where these are found to be applicable. A corollary test of

procedural just cause mandates that, except for those offenses which justify summary discharge, the penalty must be in "conformity with the guiding precept of progressive or corrective, rather than punitive, discipline."[1]

In the instant matter, there can remain no serious doubt that not only general just cause principles but the specific policy of the Company contemplates that applicable mitigation factors be considered. It should be noted in this regard that rather than unequivocally specifying termination for violations of its Lottery/Alcohol and tobacco Sales Policies and Procedures, it states, in relevant part, that:

- Associates may be subject to disciplinary action up to and including termination…for selling to minors.
- The Rainbow foods policies…are intended to insure full compliance with all…ordinances. Failure to comply with any laws or company policies may result in discipline up to and including termination.

The language of this policy notice makes conspicuous use of the discretionary term "may" rather than the mandatory "shall," thereby indicating that mitigating circumstances warrant consideration in deciding a proper remedy. Lest any doubt linger the terminology of the notice makes clear that disciplinary measures "up to," i.e., short of termination "may result" from any "failure to comply with any laws or company policy" covering sales of tobacco products to minors.

Accordingly, the following mitigating circumstances are found and given due consideration:

Contrary to the Company's assertion that the Grievant "blatantly" violated applicable law and work rules, the videotape in evidence shows him making two fumbling and confused attempts to comply with the correct procedure for checking the young person's ID before selling her cigarettes.

The term blatant is commonly understood to be synonymous with "brazen," "impudent," "shameless."[2] To the degree that the Employer based its discharge decision on the belief that the Grievant's failure to correctly follow the proper procedures covering sale of tobacco to a minor was blatant, brazen, impudent and/or shameless, such decision substantially mischaracterized his actions.

Evidence that the Grievant was confused rather than culpably negligent in handling the subject transaction can be seen in his repeated attempts to understand and deal with the "Not For Sale" prompt which appeared after he had entered the minor's ID information into the register.

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[1] See Chapter 19, "Just Cause and Progressive Discipline," Arnold Zack, in Labor and Employment Arbitration, Bornstein and Gosline, Editors, Matthew Bender Publishers, NYC (1990).

[2] See both New Webster's Dictionary of the English Language and Webster's Collegiate Dictionary, Random House.

Of particular significance to the question of culpability or severity of offense is what followed next in the Grievant's confused attempts to get the procedure right – he turned to his own duty supervisor at his side and asked what the "Not For Sale" indication meant on his cash register display.

Ms. LeTexier promptly responded that she didn't know what this prompt meant, then cleared the entry and advised him to proceed with the sale. The critical importance of the Grievant's question and his supervisor's inability to provide him an answer is not that her failure to properly instruct him how to deal with the sale somehow shifts the blame to her but, rather, that the fact neither the Grievant nor Ms. LeTexier understood the meaning of the prompt likely suggests that both were inadequately trained to know that the Not For Sale prompt signaled an attempt by a minor to buy a tobacco product.

The Company asserts that the supervisor was not aware that a purchase of cigarettes was involved because the Grievant never told her of this fact and she was busily involved with a sale to another customer. This argument is essentially irrelevant. The videotape shows the cigarette pack was on the counter in her sightline as she moved to clear the Grievant's cash register. The consequential point here is that the Grievant sought his supervisor's advice and followed her direction to proceed with the sale after she had cleared the Not For Sale prompt from the register's display.

It necessarily follows from the foregoing analysis of the actual taped transaction that the facts reveal substantial mitigating factors in regard to the degree of the Grievant's culpability in the sale of cigarettes to the police shill. His fault should be further mitigated by the fact that, to his recollection, the Grievant had never before entered an ID that produced the Not For Sale prompt.

This would seem unremarkable from the undisputed testimony that the demographics of the neighborhood served by the store were of predominantly older residents. Indeed, another supervisor gave uncontraverted testimony that she was aware of only one other attempted purchase of cigarettes by a minor in this outlet over the past four years. These facts indicate that the Grievant had no opportunity to use such training about tobacco sales to minors over a considerable length of time since he had received it.

This review cannot close without consideration of the Company's argument that the Grievant could have and, indeed, should have spotted the police shill as a minor by a simple calculation from the date of birth on her ID. To make it even simpler for him, the Company points out that close to the Grievant's assigned work station was a warning sign that posted the date of birth a customer would have to be on that date in order to legally purchase tobacco products.

The fatal flaw in this line of argument lies in absence of any Company rule or instruction which would require an employee to consult these alternative ways of checking whether or not a customer seeking to purchase a restricted product is a minor.

The Rainbow Foods Policies and Procedures Notification covering "Lottery/Alcohol and Tobacco Sales" contains the instruction to…look for a birth date on or before today's date of 4/3/86 (date handwritten). The instruction appears a second time on the notice, this time with the handwritten note "at least of 4/3/83." Neither of these dates corresponds to the date of the incident that led to the termination of the Grievant's employment, nor does the instruction state that the employee should calculate the necessary update or confer with any posting thereof.

Instead, the notification identified as Union Exhibit 2 consistently refers to checking the legality of the customer's age by relying on the information on the cash register display. Careful reading of that bulletin entitled "Lottery/Alcohol and Tobacco Sales" shows no mention of other ways of checking the legality of such customer's age. The only instructions are given as follows:

> The prompt will appear for all tobacco and liquor items. Company policy requires those who are operating a register to check ID's and enter the date of birth for ALL liquor and tobacco purchases.
>
> THE CASHIER WILL ASK FOR THE VALID ID, PRESS <CLEAR> AND KEY IN THE DATE OF BIRTH <MMDDYY> <ENTER>
>
> The receipts will appear with "ID ENTERED" with the date. If the sale is restricted, the display will prompt an error message.
>
> - LOCAL LAW ENFORCEMENT agencies are legally required to conduct compliance checks. The local police send minors into grocery stores to try and purchase the products illegally.
> - Associates may be subject to disciplinary action including termination, penalties and/or fines that can vary by city and/or municipality for selling to minors.
> - The Rainbow Foods policies that are in place are intended to insure full compliance with all Federal, State and Local ordinances. Failure to comply with any laws or company policy may result in discipline up to and including termination.
>
> I understand that it is my responsibility to check ID's and enter the date of birth from that ID. I have read and understand the above ramifications of Rainbow Foods polices regarding the sale of tobacco, tobacco products, beer/wine coolers, and lottery.

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The argument that the Grievant should have somehow gone beyond the advice on dealing with the sale in question provided by his supervisor fails to answer the obvious question of why the Grievant should have had any doubt that his supervisor's advice was correct.

In plain truth, the record shows that he followed each and every step outlined in the Company's Policy and Procedure bulletin. At the point where he became confused by the displayed prompt, the Grievant took an entirely logical next step – he consulted his supervisor. He then reasonably acted on such guidance and completed the sale.

But, it must be asked, should the Grievant be held entirely blameless for the sale of cigarettes to the police skill? If proper weight is given to the positive aspects of the Company's commitment to training its sales clerks to comply with the prohibition of such sales, the answer is certainly in the negative.

While the Company might have done a better job by spelling out in its policy bulletin and in its training program that the signal Not For Sale is what the bulletin means by the instruction "If the sale is restricted, the display will prompt an error message." At risk of being repetitious, the fact that two literate employees, the Grievant and Ms. LeTexier did not understand that Not For Sale was the so-called error message prompt shows a significant flaw in the promulgation of the policy.

The other side of the coin, however, is the undisputed testimony that, like all employees who were trained in how to handle the prohibition of such sales, the Grievant had the chance to ask clarifying questions before he signed off attesting that he understood his responsibilities for compliance with applicable legal and policy restrictions. Furthermore, even though he was never instructed to do the simple math to quickly calculate from an ID date of birth whether a customer is a minor, it is not unreasonable for the Employer to expect that an alert and conscientious employee would do so.

In sum, while the Grievant's failure to spot the police shill as a minor was substantially mitigated, it was not exculpated by flaws in the training and promulgation of the Company policy and work rule.

DECISION

Based on the findings of mitigating and extenuating circumstances the discharge penalty against the Grievant is, hereby, reduced to a one week unpaid suspension.

He shall be reinstated to his former position and shall be made whole for all other loss of interim earnings and benefits attributable to his termination of employment.

The Arbitrator retains jurisdiction for a period of ninety (90) calendar days for the sole purpose of resolving any dispute over remedy.

1/8/2007
Date

John J. Flagler, Arbitrator